STATE OF MICHIGAN

COURT OF APPEALS

JEANNETTE M. WOLF, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED April 8, 2003
V	No. 228970 Genesee Circuit Court
PINKERTON'S, INC., Defendant-Appellant/Cross-Appellee.	LC No. 97-055173-CL

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiff Jeannette Wolf was awarded judgment, following a jury trial, on her claims of employment discrimination by defendant Pinkerton's, Inc. based on her sex, contrary to the Michigan Civil Rights Act (CRA)[1] and violation of the Whistleblowers' Protection Act (WPA).[2] Pinkerton's appeals as of right, and Wolf cross-appeals. We affirm.

I. Basic Facts And Procedural History

In 1995, Pinkerton's hired Wolf to work as a security officer at a General Motors plant in Flint. After Wolf had worked as a security officer for some time, she expressed interest in becoming a fire guard, a position occupied exclusively by men. Wolf explained that whereas the security officer position required some outdoor and weekend work, fire guards worked indoors and had a set weekday-only schedule. However, when Wolf asked site coordinator John White and supervisor Charles Meek about training for the fire guard position, she was treated dismissively. After Wolf had been denied formal training for the fire guard position, she began watching the fire guards on duty, who provided her with some informal training.

After she had one year of experience, a part-time fire guard position became available, and Wolf again expressed her interest; however, White made a comment about the previous

[1] MCL 37.2101 *et seq.*

[2] MCL 15.361 *et seq.*

female fire guard, expressed doubt that Wolf knew enough about the job, and asked derisively whether she could lift a fifteen-pound fire extinguisher. Rather than fill the part-time fire guard position, Pinkerton's initially assigned a full-time fire guard to work overtime to cover the open shifts. The position was ultimately filled by a man who had not completed the necessary training, had been at the plant for only about seven weeks, and did not want the job.

On January 16, 1997, Wolf came to work on her day off to meet with James Brusen from MIOSHA. At the meeting, which was held in the fire guard office at the plant, Wolf expressed several safety concerns relating to the "ISI packs," which were tanks of air with attached masks used during fires. Wolf felt the ISI packs were inadequate in number, ill-fitting, and inconveniently located. Wolf also mentioned that their polyester uniforms were too flammable, as she had occasion to discover when a piece of hot welding debris fell on her leg and caused her pants to melt. Wolf told Brusen that Pinkerton's did not provide regular training for the fire guard position, and had hired at least one person with no formal fire training who did not want the position. Wolf believed she gave Brusen permission to use her name as the person he spoke to regarding these issues, and at least one of Wolf's superiors, supervisor Charles Meek, was aware that she had met with Brusen.

The week after the MIOSHA meeting, Wolf accepted a two-day job as a safety overseer for a company called General Vector, a General Motors contractor that worked in the same plant as Wolf. Before accepting the offer, Wolf contacted Tony Parker, an employee in Pinkerton's administrative office, to make sure that working for General Vector did not present a conflict of interest. Wolf was concerned because Kurt Runyan, one of her supervisors, had recently told her that she "was skating on thin ice" after she had taken some days off and talked to the MIOSHA representative. Parker, however, assured Wolf that there was nothing in her contract that prevented her from working for General Vector.

On January 23, 1997, Wolf arrived at the plant on the day she was scheduled to work for General Vector. To gain access to the plant, she used her Pinkerton's-issued security badge to enter the main gate, went directly to the security desk where another security officer was posted, and signed in on General Vector's contractor's sheet. Wolf had not been instructed in the proper uses of the security badge beyond the statement printed on the badge itself, which read: "This card is issued for your use in connection with company business. It remains the property of General Motors Corporation and must be surrendered upon termination of employment." When Wolf arrived at the job site, she learned that the job had been canceled, so she left the plant for the day. At 8:00 p.m. that evening, John Kurtle, a supervisor for General Vector, came to Wolf's house to tell her there was a problem and that accusations were flying. He told Wolf to call before she came to work for General Vector the next morning.

On the morning of January 24, 1997, Wolf called White, who told her to come to work so they could talk to her. When Wolf arrived in the main supervisor's office, a union steward was there. White asked Wolf if she had come in to work for General Vector, which she admitted. He then asked her if she had used her badge, which she also admitted. At that point, White informed Wolf that she was suspended pending further investigation. When she asked who had made the decision to suspend her, White told her that he did not know, but that it was not him. However, evidence indicated that White had issued Wolf's suspension papers and either conducted or

helped in the investigation into Wolf's badge use. She also asked on what grounds she was being suspended, and he informed her that he did not know, but that it had something to do with misrepresentation and possibly involved her badge. White told Wolf to contact the main office and that they would handle the matter.

At the main office, Wolf talked to Lori Yount, Pinkerton's office manager, who told Wolf she was being terminated for reasons relating to the use of her badge. When Wolf again asked who had made the decision to fire her, Yount refused to say, telling Wolf only that "they" felt that she should have known better than to misuse her badge.

White's findings respecting Wolf's badge use were turned over to Joe Walsh, who in turn reported them to Brad Reno, Pinkerton's section account manager. Reno admitted that he made the decision to remove Wolf from the General Motors account, but he asserted at trial that either the district office or Lori Yount made the decision to terminate Wolf's employment altogether. However, Reno's deposition testimony indicated that he made the decision to fire Wolf. Reno acknowledged that the security officers' badges were owned by General Motors, and that any policies adopted by General Motors regarding the use of the badges were not conveyed to the security officers. Reno admitted that he did not know if Wolf's actions violated General Motors' policies. Although there was no direct evidence that Reno knew of Wolf's meeting with the MIOSHA representative, Reno knew that MIOSHA had visited the plant because Meek had contacted him when the representative arrived and, at the close of the visit, Reno was told that there were several violations for which Pinkerton's would probably receive citations.

On March 6, 1997, Wolf filed a six-count complaint against Pinkerton's alleging gender discrimination, sexual harassment, violation of the WPA, retaliatory discharge under the CRA, wrongful discharge, and defamation. The trial court dismissed the wrongful discharge claim without prejudice, and later granted a directed verdict respecting Wolf's claim that Pinkerton's refusal to hire her for the backup supervisor position constituted gender discrimination. The jury deliberated only on the claims for gender discrimination, harassment, and violation of the WPA.

The jury rejected Wolf's sexual harassment claim, but concluded that Pinkerton's violated the WPA by terminating her after the MIOSHA meeting and also engaged in gender discrimination for failing to offer Wolf a position as a fire guard. The jury returned a general verdict awarding Wolf $32,837 in lost wages and $50,000 in noneconomic damages. Pinkerton's filed a motion for judgment notwithstanding the verdict (JNOV) on both claims, which the trial court denied.

II. Judgment Notwithstanding The Verdict

A. Standard Of Review

We review de novo the trial court's decision on a motion for JNOV.[3]

B. Whistleblower's Protection Act Claim

Pinkerton's argues that the trial court erred in denying its motion for JNOV on Wolf's WPA claim. When reviewing a decision on a motion for JNOV, we view the evidence and all legitimate inferences in the light most favorable to the nonmoving party.[4] The motion should only be granted where the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law.[5] If reasonable jurors honestly could have reached different conclusions based upon the evidence, neither the trial court nor this Court may substitute its judgment for that of the jury.[6]

To establish a claim under the WPA, a plaintiff must show that (1) she was engaged in a protected activity as defined in the act, (2) the defendant discharged her, and (3) a causal connection existed between the protected activity and her discharge.[7] Once the plaintiff has met the burden of establishing these elements, the burden then shifts to the defendant to articulate a legitimate business reason for the discharge.[8] If the defendant satisfied its burden of articulating a legitimate reason for the discharge, the plaintiff could still prevail by showing that the defendant's proffered reason was not the true reason, but only a pretext for the discharge.[9]

The only element in dispute on appeal is whether Wolf demonstrated a causal connection between her discharge and the protected activity. Pinkerton's argues that Wolf failed to prove this element because it was General Motors who actually determined Wolf's fate, and further, its own employees who were involved in the decision to terminate Wolf's employment were unaware that she had met with the MIOSHA representative.

First, contrary to Pinkerton's assertion, the evidence at trial did not show that General Motors made the decision to terminate Wolf's employment. General Motors' security manager testified that he only recommended that Wolf be removed from General Motors' account with Pinkerton's. Pinkerton's effectively terminated Wolf's employment when it did not offer her a job transfer to a different account. Additionally, even if Wolf could not be assigned to work for another of Pinkerton's clients in the Flint area, there was evidence that Wolf was willing to

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[3] *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 395; 628 NW2d 86 (2001).

[4] *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995).

[5] *Id*. at 558.

[6] *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

[7] *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998).

[8] *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000).

[9] *Id*. at 281.

consider relocating. Instead of exploring this option after General Motors made its request, Pinkerton's terminated Wolf's employment. Viewed in a light most favorable to Wolf, there was sufficient evidence from which a reasonable juror could find that it was Pinkerton's, not General Motors, who was ultimately responsible for Wolf's firing.

Pinkerton's also claims that there was no evidence that the employees who were involved in the decision to terminate Wolf's employment were aware that she met with the MIOSHA representative. Under the WPA, "[a]n employer is entitled to objective notice of a report or a threat to report by the whistleblower."[10] Generally, the individual or individuals responsible for terminating the plaintiff's employment must be aware of the report.[11]

In this case, there was evidence that several people were involved in the decision to terminate Wolf's employment, namely, Brad Reno, Lori Yount, John White, and Joe Walsh. Although none of these individuals admitted making the actual decision to fire Wolf, the evidence indicated that each may have played a role in the ultimate discharge decision. It was a question of fact for the jury which one or more of these individuals was involved in the decision-making process.

Of the Pinkerton's employees who testified, only Charles Meek admitted to knowing that Wolf met with a MIOSHA representative, and Meek was not involved in the decision to terminate Wolf. However, the MIOSHA representative met with both Meek and Walsh at the beginning of the investigation and then met with Meek, Reno, and Walsh at the end of his investigation, to inform them that Pinkerton's should expect to be cited for safety violations. A juror could reasonably infer from the evidence that Meek informed Reno and Walsh, who may have been involved in the decision to terminate Wolf, about which individuals met with the MIOSHA representative.

Moreover, there was testimony that other employees who spoke with MIOSHA were also terminated. Wolf herself testified that she believed that she gave the MIOSHA investigator permission to use her name as the source of the report and she was warned by a supervisor that she was "on thin ice" shortly after her report was made. While the MIOSHA investigator testified that the names of informants are often kept confidential, the jury could have accepted Wolf's testimony and found that she willingly gave her name to MIOSHA as the source of the complaint. Thus, there was sufficient evidence to allow the jury to infer that information about the source of the complaints to MIOSHA was conveyed during a follow-up meeting with the MIOSHA representative, or sometime thereafter.

The timing of Wolf's termination also supports her claim that there was a causal connection between her whistleblowing activities and her termination.

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[10] *Roulston*, *supra* at 279.

[11] See *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 300-301; 624 NW2d 212 (2001).

> Close timing between alleged protected activity and the termination of a plaintiff's employment may establish the "causal connection" element of a plaintiff's prima facie case of retaliation, and "[t]he proofs offered in support of the prima facie case may be sufficient to create a triable issue of fact that the employer's stated reason is a pretext, as long as the evidence would enable a reasonable factfinder to infer that the employer's decision had a discriminatory [here, retaliatory] basis."[12]

Here, the timing of Wolf's termination was very close to the date that she met with the MIOSHA representative, not much more than one week later. This close timing provides further support for Wolf's claim that Pinkerton's discharged her because of her report to MIOSHA.

Furthermore, Wolf presented sufficient evidence to show that Pinkerton's proffered reason for discharging her was a pretext for discrimination. Although Pinkerton's cited Wolf's misuse of her security badge as the reason for her dismissal, Pinkerton's employees admitted that there was no written policy regarding badge usage. Despite questions regarding that policy, Pinkerton's did not opt only to warn or suspend Wolf. Further, there was evidence that other security guards who regularly used their badges to allow workers into the plant were not routinely disciplined. On these facts, the jury could have found that Pinkerton's proffered reason for terminating Wolf's employment was a mere pretext for discrimination, contrary to the WPA.

Accordingly, the trial court did not err in denying Pinkerton's motion for JNOV respecting Wolf's WPA claim.

C. Adverse Employment Action

Wolf also prevailed at trial on her claim that Pinkerton's failure to offer her a position as a fire guard constituted gender discrimination. Pinkerton's argues that the trial court erred in denying its motion for JNOV on this claim because Wolf did not suffer an adverse employment action.

Every discrimination claim requires proof that the plaintiff suffered an adverse employment action.[13] In *Wilcoxon v Minnesota Mining & Mfg Co*,[14] this Court, looking to federal law on the subject, articulated the following test to determine whether a plaintiff suffered an adverse employment action: first, "the action must be materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities,'"[15] and second, "there must be some objective basis for demonstrating that the change is adverse because 'a plaintiff's

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[12] *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 661; 653 NW2d 625 (2002), quoting *Town v Michigan Bell Telephone Co*, 455 Mich 688, 697; 568 NW2d 64 (1997).

[13] *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 362; 597 NW2d 250 (1999).

[14] *Id*.

[15] *Id*., quoting *Crady v Liberty Nat'l Bank & Trust Co*, 993 F2d 132, 136 (CA 7, 1993).

"subjective impressions as to the desirability of one position over another" [are] not controlling[.]'"[16]

In this case, there was ample testimony indicating that the fire guard position, although not involving a pay increase, was a more favorable position because it involved working inside the plant and did not require work on weekends. These constitute objective indications, apart from Wolf's own subjective beliefs. There were material differences in the work hours and conditions associated with the position. As the trial court observed, there was also testimony that placement in the fire guard position was helpful to advancement in the organization because it was another facet of the job that an officer could master to show that he or she was knowledgeable about Pinkerton's work.

Accordingly, the trial court did not err in denying Pinkerton's motion for JNOV on this ground.

III. Wolf's Cross-Appeals

A. Directed Verdict On Gender Discrimination Claim

1. Standard Of Review

This Court reviews de novo a trial court's decision on a motion for directed verdict.[17]

2. Analysis

In her cross-appeal, Wolf argues that the trial court erred when it directed a verdict in favor of Pinkerton's with regard to her claim of gender discrimination based on Pinkerton's failure to promote her to a position of backup supervisor. When reviewing the court's decision, this Court must "view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed."[18] A motion for a directed verdict should only be granted "when no factual question exists on which reasonable jurors could differ."[19]

The focus of this claim was whether Wolf was treated differently than a similarly situated male employee. A prima facie case of discrimination under this theory requires a plaintiff to prove the following elements:

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[16] *Id*. at 364, quoting *Kocsis v Multi-Care Mgt, Inc,* 97 F3d 876 (CA 6, 1996), quoting *Kelleher v Flawn,* 761 F2d 1079, 1086 (CA 5, 1985).

[17] *Derbabian v S & C Snowplowing, Inc,* 249 Mich App 695, 701; 644 NW2d 779 (2002).

[18] *Id*. at 701-702.

[19] *Id*. at 702.

> The modified *McDonnell Douglas* prima facie approach requires an employee to show that the employee was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct.[20]

Wolf argues that the trial evidence showed that she was similarly situated to Steven Yancy, who Pinkerton's ultimately hired as the backup supervisor. The evidence showed that Yancy had both a bachelor's and master's degree, whereas Wolf had only a high school education. A disparity in educational credentials is typically enough to show that two candidates for the same job are not similarly situated.[21] Although Wolf had more experience on the job, she only had an advantage of a few more months' experience than Yancy. Further, in addition to the difference in education, the evidence indicated that Yancy also scored higher in his interview questions. In sum, Wolf failed to show that she was similarly situated to Yancy.

Wolf argues that she was able to prove her claim based upon a somewhat different test for indirect evidence of gender discrimination.

> Absent direct evidence of discrimination, a plaintiff may establish a prima facie case of employment discrimination by showing (1) that the plaintiff was a member of a protected class, (2) that an adverse employment action was taken against the plaintiff, (3) that the plaintiff was qualified for the position, and (4) that the plaintiff was replaced by one who was not a member of the protected class.[22]

Although Wolf could show the above elements because she was replaced by Yancy, a male, once she did so, the burden shifted to Pinkerton's to articulate a legitimate, nondiscriminatory reason for not promoting her.[23] Pinkerton's presented evidence that Yancy was chosen for the position because of his superior educational credentials and his professional demeanor. He also scored higher on interview questions. These constituted legitimate business reasons for promoting Yancy rather than Wolf.

Accordingly, Wolf had the burden of showing by a preponderance of the evidence that Pinkerton's reasons were a mere pretext for discrimination.[24]

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[20] *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 448; 622 NW2d 337 (2000), quoting *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997) (Brickley, J.).

[21] *Smith*, *supra* at 449-450.

[22] *Smith*, *supra* at 447, quoting *Feick v Monroe Co*, 229 Mich App 335, 338; 582 NW2d 207 (1998).

[23] *Feick*, *supra* at 339.

[24] *Id*. at 343.

> A plaintiff can establish that a defendant's articulated legitimate, nondiscriminatory reasons are pretexts (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision.[25]

In this case, Wolf was unable to show that Pinkerton's reasons for offering Yancy the job were a mere pretext for discrimination. As the trial court noted, there was no direct evidence that gender discrimination was the motivating factor behind Pinkerton's hiring decision. The fact that few women were offered this position over the years was not enough to disprove Pinkerton's motivations for offering Yancy the job, given his superior credentials. Pinkerton's had at least one full-time female supervisor, and a female backup supervisor was apparently transferred over to the plant from another facility. Unlike the situation with the fire guard position, Wolf did not submit any evidence of direct discrimination, i.e., comments made by Pinkerton's management that women could not occupy supervisory positions.

Accordingly, the trial court did not err in granting Pinkerton's motion for a directed verdict on Wolf's discrimination claim associated with the backup supervisor position.

B. Amount Of Attorney Fees

1. Standard Of Review

We review the trial court's award of attorney fees for an abuse of discretion.[26]

2. Analysis

Wolf challenges the trial court's decision to award her attorney fees at an hourly rate of $138, rather than $175 as requested. The trial court declined to award the higher amount because it did not believe it was representative of the fees customarily charged in the Flint legal community.

In determining a reasonable hourly rate, a trial court should consider the factors listed in the Michigan Rules of Professional Conduct, Rule 1.5(a).[27] MRPC 1.5(a)(3) includes as a factor "the fee customarily charged in the locality for similar legal services." The trial court determined that a rate of $175 was excessive in the Flint area when Wolf's affidavits on this issue did not show adequately that this was the prevailing rate in the community. After Wolf objected to a rate of $125 an hour, based upon the State Bar's economics survey, it was her own attorney who pointed out to the court that that same survey set a rate of $138 an hour for labor lawyers. On these facts, the trial court did not abuse its discretion in setting the rate at $138 an hour.

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[25] *Id*.

[26] *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995).

[27] *Id*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald S. Owens